TRANS RESOURCES CORPORATION SDN BHD

v.

SANWELL CORPORATION & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-489-1999]
13 NOVEMBER 2000

CIVIL PROCEDURE: *Stay of proceedings - Arbitration clause - Requirements before stay granted - Arbitration Act 1952, s. 6*

CIVIL PROCEDURE: *Stay of proceedings - Arbitration clause - Taking a step in proceedings - Meaning of - Whether entering of unconditional appearance amounted to taking a step in proceedings - Arbitration Act 1952, s. 6*

The first respondent engaged the appellant to carry out earthworks upon the terms and conditions of a contract. Clause 41 of the contract provides for the arbitration of disputes and/or differences arising between the parties to the contract.

The appellant claimed against the first respondent a sum of RM17,459,445.69 for earthworks performed. The first respondent disputed the claim. The first respondent applied to the High Court for a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 ('the Act') which was granted. Hence this appeal.

The issue for consideration in this appeal was whether the unconditional appearance entered by the first respondent amounted to a step in the proceedings. This was based on one of the conditions in s. 6 of the Act which states that the party seeking a stay must not have taken 'any other steps in the proceedings' before it applied for the stay.

Held:
Per Shaik Daud Ismail JCA

[1] Pursuant to s. 6 of the Act, there are four requirements to be satisfied before a stay could be granted, namely: (a) that legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration; (b) that no other steps in the proceedings be taken before the making of the

application for stay; (c) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; (d) that the applicant was at the time of the application remains ready and willing to do all things necessary for the proper conduct of the arbitration.

[2] In the present case, an unconditional appearance was entered. Such unconditional appearance does indeed constitute the taking of a step in the proceedings within s. 6 of the Act. The respondent in doing so, lost its right to rely on s. 6.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden pertama telah mengambil perayu untuk menjalankan kerja-kerja tanah atas terma-terma dan syarat-syarat sesebuah kontrak. Fasal 41 kontrak tersebut memperuntukkan menimbangtara dan/atau perbezaan yang berbangkit antara pihak-pihak kepada kontrak tersebut.

Perayu menuntut terhadap responden pertama jumlah sebanyak RM17,459,445.69 untuk kerjatanah yang telah dilaksanakan. Responden pertama mempertikaikan tuntutan tersebut. Responden pertama telah memohon kepada Mahkamah Tinggi untuk satu penggantungan prosiding selaras dengan s. 6 Akta Timbangtara 1952 ('Akta tersebut') yang telah diberikan. Oleh itu menyebabkan rayuan ini.

Isu untuk pertimbangan dalam rayuan ini adalah samada kehadiran tidak bersyarat yang dimasuki oleh responden pertama membawa kepada satu langkah dalam prosiding tersebut. Ini adalah berdasarkan satu daripada syarat-syarat dalam s. 6 Akta tersebut yang menyatakan bahawa pihak yang cuba mendapatkan penggantungan semestinya tidak mengambil "sebarang langkah lain dalam prosiding tersebut" sebelum ianya memohon untuk penggantungan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Selaras dengan s. 6 Akta tersebut, terdapat empat syarat untuk dipenuhi sebelum sesuatu penggantungan boleh diberikan, iaitu (a) bahawa prosiding undang-undang semestinya telah dimulakan terhadap pemohon berhubung dengan sesuatu perkara yang telah dipersetujui seharusnya dirujuk kepada timbangtara; (b) bahawa tiada langkah lain dalam prosiding itu harus diambil sebelum membuat permohonan untuk penggantungan; (c) bahawa tidak terdapat alasan yang mencukupi

mengapa perkara tersebut tidak seharusnya dirujuk kepada timbangtara sepertimana yang dipersetujui antara pihak-pihak tersebut; (d) bahawa pemohon adalah pada waktu permohonan kekal bersedia dan rela untuk melakukan kesemua perkara yang perlu untuk pengendalian sempurna akan timbangtara tersebut.

[2] Dalam kes semasa, suatu kehadiran tidak bersyarat telah dimasuki. Kehadiran tidak bersyarat sedemikian sesungguhnya telah membentuk pengambilan langkah dalam prosiding tersebut di dalam lingkungan maksud s. 6 Akta tersebut. Responden dalam melakukan sedemikian, telah kehilangan haknya untuk bergantung pada s. 6.

[Rayuan dibenarkan.]

Case(s) referred to:
Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd [1999] 2 CLJ 843 ***(foll)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(foll)***

Legislation referred to:
Arbitration Act 1952, s. 6

For the appellant - CC Choo (Hazila Moharam with him); M/s CC Choo & Co
For the 1st respondent - Loh Siew Cheang (Chua Eng Siong with him); M/s Cheang & Ariff
For the 2nd respondent - Maidzuara Mohamed (Rohan Sankey with him); M/s Logan Sabapathy & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-42-98]

Reported by Mariette Peters-Goh

JUDGMENT

Shaik Daud Ismail JCA:

The 1st respondent engaged the appellant to carry out earthworks upon the terms and conditions of a contract dated 30 October 1966 (the said contract) between them. Clause 41 of the said contract provides for the arbitration of disputes and/or differences arising between the parties to the contract. The said clause provides:

> ... If the parties do not reach such amicable solution within 14 days from the request sent by any party to the other party to start the above negotiations, then the disputes shall be finally settled by arbitration, pursuant to section 41 below.

Arbitration

(a) If any dispute or differences shall arise between the client and the Earthworks Contractor, either during the progress or after completion of the Works, or after the termination of the Earthworks Contractor's employment, or breach of this Contract, as to:

(i) the construction of this Contract, or

(ii) any matter or thing of whatsoever nature arising under this Contract, or then such dispute or differences shall be referred to the Regional Centre for Arbitration at Kuala Lumpur (the "Arbitrator") for a decision ...

The appellant claimed against the 1st respondent a sum of RM17,459,445.69 allegedly owed by the 1st respondent to the appellant for earthworks performed under the said contract. The 1st respondent disputed the claim. The 1st respondent applied to the High Court for a stay of the proceedings pursuant to s. 6 of the Arbitration Act 1952 (the Act). The High Court rightly held that there are four requirements to be satisfied before a stay could be granted under s. 6 of the Act, and the requirements are:

(a) That legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration.

(b) That no other steps in the proceedings be taken before the making of the application for stay.

(c) That there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties.

(d) That the applicant was at the time of the application, and remains ready and willing to do all things necessary for the proper conduct of the arbitration.

In opposing the application for a stay, the appellant raised four issues namely that:

(a) there is no dispute as the 1st respondent had acknowledged that there is a debt due and owing by the 1st respondent to the appellant,

(b) that the disputed relief sought is not within the terms and scope of the arbitration clause,

(c) there would be multiplicity of proceedings, and

(d) that the 1st respondent appellant had taken steps in the proceedings by filing an unconditional appearance.

This appeal, in fact, centres on issue (d) above. As can be seen from s. 6 of the Act above, one of the conditions for a stay of proceeding, is that the party seeking a stay must not have taken "any other steps in the proceedings" before it applied for the stay. In the present case an unconditional appearance was entered. The sole issue is whether the filing of an unconditional appearance is a step in the proceedings, and if so the stay ought not to have been allowed. There are several cases which held that the entering of an unconditional appearance, is not a step in the proceedings. In *Usahabina v. Anuar b. Yahya* [1998] 2 CLJ Supp 131, after reviewing all such cases the High Court came to the conclusion that the entry of an unconditional appearance is a step in the proceedings. In the present case, the High Court found no favour in the decision in *Usahabina* but held that "the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration ..." When the decision in the present case was arrived at, the High Court had only the benefit of the *Usahabina*'s decision at first instance. Since then the Court of Appeal, had concluded that *Usahabina* was rightly decided. In *Interscope Versicherung Sdn. Bhd. v. Sime Axa Assurance Bhd.* [1999] 2 CLJ 843 at 849 the Court of Appeal states thus:

> Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decision of the Malaysian Courts that held the entry of an unconditional appearance not to amount to a step in the proceedings did so by acting upon English cases without properly appreciating that the two provisions (s. 6 of the Act and s. 4(2) of the United Kingdom statute) are differently constructed.
>
> After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina v. Anuar b. Yahya* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s. 6 of the Act. I find it necessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in *Usahabina*. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s. 6 of the Act, he must enter a conditional appearance before moving the court.

The High Court in the present case did not have the benefit of the subsequent judgment of the Court of Appeal in the *Interscope* when it decided on the same issue. Until overruled by the Federal Court, this court is bound by its own decision in *Interscope*. As stated earlier in the present case, the 1st respondent entered an unconditional appearance, therefore it lost its right to rely on s. 6 of the Act, to move the court to stay the action. On this score alone, we allowed the appeal with costs here and below to be paid by the 1st respondent and we set aside the order of the High Court. We also ordered the deposit to be refunded to the appellant.